



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-05-03

QUESTION:

As a former state employee affiliated with the General Court, what restrictions do you face under G.L. c. 268A, § 5(e) in acting as a legislative agent before the General Court?

ANSWER:

General Law c. 268A, § 5(e) does not prohibit you from engaging in public advocacy activities for compensation, as discussed below, provided that you do not do so on the grounds of your former governmental body. G.L. c. 268A, § 5(e) will, however, prohibit you from both directly lobbying your former governmental body and from engaging in lobbying that body through strategic legislative agent activities, as discussed below. Additionally, before engaging in permissible forms of public advocacy, you must ensure you comply with the requirements of G.L. c. 268A, §§ 5(a), 5(b) and 23(c).

FACTS:

You recently resigned from your position with the General Court to take a position with a private organization with legislative interests in Massachusetts. You are interested in engaging in a number of activities that are ultimately designed to influence legislation that may be before the General Court. For example, you wish to engage in what we will refer to as public advocacy, such as speaking at rallies or public meetings related to legislation, encouraging the public to contact Massachusetts legislators to express views on pending legislation, attending press conferences on proposed legislation, and encouraging the public to engage in letter-writing campaigns to the General Court. Additionally, you wish to engage in what we will refer to as strategic lobbying. Strategic lobbying may include developing strategies for your organization and other groups to use in opposing or supporting relevant legislation, assisting activists in planning which legislators to contact, drafting letters to be signed under a third party's signature, strategizing with your employer or a client on which legislative districts they should target, obtaining information on legislation from your private organization's legislative agent, and discussing your private organization's position on legislation with that legislative agent. You do not wish to engage in direct lobbying, which includes you directly calling, contacting, writing or interacting with members or employees of the General Court.

DISCUSSION:

When you left your position at the General Court, you became a former state employee for purposes of G.L. c. 268A, the conflict of interest statute. Sections 5 and 23(c) of G.L. c. 268A apply to your activities as a former state employee. In particular, G.L. c. 268A, § 5 contains a one year prohibition on former state employees acting as a legislative agent. It provides:

“[A] former state employee or elected official, including a former member of the general court, who acts as legislative agent, as defined in section thirty-nine of chapter three, for anyone other than the commonwealth or a state agency before the governmental body with which he has been associated, within one year after he leaves that body . . . shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both.” G.L. c. 268A, § 5(e) and § 5(f).

In turn, G.L. c. 3, § 39 defines a “legislative agent” as follows:

“[A] person who for compensation or reward does any act to promote, oppose or influence legislation, or to promote, oppose or influence the governor’s approval or veto thereof. The term ‘legislative agent’ shall include a person who, as part of his regular and usual business or professional activities and not simply incidental thereto, attempts to promote, oppose or influence legislation, or the governor’s approval or veto thereof, whether or not any compensation in addition to the salary for such activities is received for such services; provided, however, that for purposes of this definition a person shall be presumed to engage in activity covered by this definition in a manner that is simply incidental to his regular and usual business or professional activities if he engages in any activity or activities covered by this definition for not more than fifty hours during any reporting period or receives less than five thousand dollars during any reporting period for any activity or activities covered by this definition.”

We first recognize that there are federal and state constitutional rights related to an individual’s right to petition government¹ and advocate a position with government that a former state employee does not forego simply by virtue of that status. Such activities are appropriate and necessary parts of the democratic process. G.L. c. 268A, § 5(e) does not prohibit a person from engaging in these activities; rather, it restricts a former state employee from receiving compensation for performing such outside activities before the governmental body with which that person served.

The conflict of interest law was “enacted as part of ‘comprehensive legislation ... [to] strike at corruption in public office, inequality of treatment of citizens and the use of public office for private gain.”² The conflict of interest statute is prophylactic in nature, where the Legislature’s objective “was as much to prevent giving the appearance of conflict as to suppress all tendency to wrongdoing.”³

More specifically, G. L. c. 268A, § 5(e) was enacted in 1978 as part of an effort to strengthen the public’s confidence in its officials.⁴ The purpose of the § 5(e) restriction is to ensure that the democratic process is not skewed to give a former state employee an undue advantage in his or her legislative agent activities. As the Commission has previously noted, “[t]he purpose of G.L. c. 268A, § 5(e) [i]s to establish a one-year cooling off period for former state employees who might otherwise be in a position to take undue lobbying advantage of former associates whose loyalties they acquired as state employees.”⁵

In short, the critical policy interest that § 5(e) guards against is allowing a former state employee, for compensation, to trade upon loyalty and contacts that he or she has gained by virtue of his or her official position. Among the ways that a person might take undue lobbying

advantage of a former associate is by personally appealing to a former colleague's loyalty, drawing on private loyalty through a lobbying associate when the former colleague is aware of that association, and advising or directing a client, another employee of your organization, or a lobbying associate, through use of insider or special knowledge of people or processes.

Implicit within your request, are two separate questions: 1) whether the activities you describe constitute acting as a "legislative agent," as defined in G.L. c. 3, § 39, and 2) whether these actions are "before the governmental body" with which you were associated so that they fall into the one year prohibition established in G.L. c. 268A, § 5(e).

We first address the question of what activities, for purposes of G.L. c. 268A, constitute the acts of a legislative agent. In doing so, we focus on the first portion of the definition of "legislative agent" in G.L. c. 3, § 39: "A person who for compensation or reward does any act to promote, oppose or influence legislation, or to promote, oppose or influence the governor's approval or veto thereof."

We begin our analysis by examining the plain language of the statute. When interpreting a statute, we do so according to the intent of the legislature ascertained from all its words construed by ordinary and approved usage of language, considered in connection with the cause of its enactment, mischief or imperfection to be remedied and the main object to be accomplished.⁶ When the words are clear and, when assigned their ordinary meaning, yield a workable and logical result, we interpret the statute without resort to extrinsic aids, such as legislative history.⁷

"Any" has been defined, in relevant part, as "one or more indiscriminately of whatever kind," or "any thing or things: any part, quantity, or number."⁸ "The word any is generally used in the sense of 'all' or 'every' and its meaning is most comprehensive."⁹ To "act" commonly means "to produce a desired effect: perform the function for which designed or employed" or "to exert power or influence."¹⁰

We conclude that the language is clear and unambiguous. Based upon the plain meaning of the statute, *all actions* undertaken with the purpose of promoting, opposing or influencing legislation or the governor's approval or veto thereof are the types of activities in which a legislative agent engages. Thus, provided that a person engages in such acts "for compensation or reward," that person will be acting as a legislative agent for purposes of G.L. c. 268A when they engage in any of the activities mentioned above, whether that activity is labeled as public advocacy, strategic lobbying, or direct lobbying.¹¹

We next turn to the question of what it means to act as a legislative agent "before the governmental body" with which you were associated, as prohibited by G.L. c. 268A, § 5(e). Absent a specific precedent on the meaning of a word or phrase in a statute, we are guided by accepted principles of construction, including the principle of relating the words in question to the associated words and phrases in the statutory context.¹²

The phrase "before the governmental body" modifies the phrase "acts as legislative agent." The word "before" commonly means "in the presence of" or "in sight or notice of" or "face to face with."¹³ Although the term "governmental body"¹⁴ is defined neither in G.L. c. 268A, § 5(e) nor in the definition provisions of G.L. c. 268A, § 1, the Commission has previously

concluded that the General Court intended that the definition in G.L. c. 268B, § 1(h) apply to § 5(e).¹⁵

Guided by the prophylactic purpose of the statute as well as the language and purpose of § 5(e), we conclude that the statute prohibits you from both directly lobbying your former governmental body by direct contact or communication, and also from indirectly lobbying that body through a member or individual who is closely connected to your private organization whom you have advised, directed, or strategized with to influence legislation. Such persons could include a client, another employee of your organization, or a lobbying associate. In the latter case, where your legislative agent activity comes before your former governmental body, even if through another person within or closely connected with your private organization, we conclude that you would in fact be acting as a legislative agent before that body, contrary to § 5(e). You would be engaging in “behind the scenes” legislative agent activity that you could not otherwise engage in personally before your former governmental body. Further, in each instance, you would be using private knowledge of past personal associations within your former governmental body to benefit your current employer or client.

Thus, G.L. c. 268A, § 5(e) prohibits you from engaging in direct lobbying activity, including directly communicating with or contacting a member or employee of the General Court, whether in person, by telephone, or in writing. Additionally, we conclude that authorizing a third party to use your name in connection with legislative agent acts constitutes acting as legislative agent before your former governmental body. Furthermore, we conclude that personally introducing an employee of your private organization or a citizen activist to a member of the General Court is also impermissible under G.L. c. 268A, § 5(e).¹⁶

Furthermore, G.L. c. 268A, § 5(e) prohibits you from receiving compensation to engage in “strategic lobbying” where you direct, advise, or strategize with a member or other closely connected individual within your private organization, such as a client, another employee of your organization, or a lobbying associate, who will in turn take the information you provide and lobby members or employees of your former governmental body. In these circumstances, your legislative agent activities are, even if through these other parties, before your former governmental body. Additionally, such activities violate the policy purpose of the statute by placing you in a position to take undue lobbying advantage of a former colleague’s loyalty. If you, for example, strategize with another employee in your organization on who or how to lobby, draft letters that will go to specific legislators, or otherwise have direct input or a degree of control into the message or over the messenger, circumstances are ripe for you to take advantage of insider information or special knowledge gained by virtue of your former position and otherwise appeal to a former colleague’s loyalty. In these circumstances, your inside knowledge may give you unequal access in the halls of government, permitting you to use your former public office for private gain and causing public confidence to be eroded in the decision-making process.¹⁷

We conclude, however, that § 5(e) does not prohibit you from engaging in paid, public advocacy activities intended to influence legislation, provided that you do not do so on the grounds of your former governmental body, as discussed below. You may permissibly engage in public advocacy provided that it is intended to influence public opinion on a piece of legislation rather than directly influence the General Court. Grassroots public advocacy that involves public education or shaping public opinion is fundamentally distinct from a situation where you advise, direct, or strategize with a client, employee, or inner circle of associates who in turn carry out your legislative strategy before the General Court.

If, for example, you hold a press conference about pending legislation that is broadcast by television and a member or employee of the General Court later sees it, we do not consider this to be a legislative agent activity that is “before” your former governmental body. Such an activity would not violate either the language or the purpose of G.L. c. 268A, § 5(e) in that it would not put you in a position to take undue advantage of former colleagues or put you in a position to use insider information.

Additionally, we conclude that the statutory language as well as the underlying purpose of G.L. c. 268A, § 5(e) do not prohibit you from engaging in other “grassroots,” public advocacy activities, including encouraging the public to contact Massachusetts legislators to express views on pending legislation and to engage in letter-writing campaigns to the General Court, provided you do not advise the public on specific strategy, such as which legislators to contact, or what to say or do when a person contacts a legislator. When you engage in “grassroots” public advocacy, your efforts are targeted to influence public opinion on an issue rather than specifically targeting the legislature. We conclude that such activities are not “before” your former governmental body and that, further, your opportunity for capitalizing on personal relationships is sufficiently removed. Prior to engaging in any of these activities, however, you must ensure that you comply with the requirements of G.L. c. 268A, §§ 5(a),¹⁸ 5(b),¹⁹ and 23(c).²⁰

We are persuaded, however, that engaging in any direct, indirect, and/or grassroots advocacy for compensation on the grounds of your former governmental body, during the one year after you leave that body, constitutes impermissibly appearing before that body. If, for example, you were invited to give a speech to an activist group in the Great Hall of Flags, we conclude it can be properly said that you are doing so “before” the General Court, as that activity can fairly be said to be “in sight or notice” of the General Court. Furthermore, giving a speech or leading a rally on the State House steps can similarly be considered to be “before” the General Court. Thus, for one year after you leave state employment, G.L. c. 268A, § 5(e) also will prohibit you from being compensated to engage in these types of activities on the grounds of your former governmental body. In these instances, engaging in legislative agent activities so near the heart of where your former governmental body does business, or in a place so integrally related to its work and over which it exerts control, may properly be deemed “before” that body.

In sum, G.L. c. 268A, § 5(e) does not prohibit you from engaging in public advocacy activity, including speaking about legislation to members of the public through press conferences or speeches, and encouraging the public to engage in letter-writing campaigns, provided that you do not do so on the grounds of your former governmental body. Rather, G.L. c. 268A, § 5(e) prohibits you, for compensation and for a period of one year after you leave your position with the Legislature, from directly lobbying your former governmental body, whether in person, in writing, or by telephone, and from “strategically” lobbying where you direct, advise, or strategize with a client, another employee, or individual who is closely connected to your private organization on how to influence your former governmental body.

DATE AUTHORIZED: July 25, 2005

¹ See, e.g., McDonald v. Smith, 472 U.S. 479, 482 (1985) (“The First Amendment guarantees ‘the right of the people . . . to petition the Government for a redress of grievances.’ The right to petition is cut from the same cloth as the other

guarantees of that Amendment, and is an assurance of a particular freedom of expression.”); Mine Workers v. Illinois Bar Association, 389 U.S. 217, 222 (1967) (The right to petition is “among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and purpose, with the other First Amendment rights of free speech and free press.”); Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939); United States v. Cruikshank, 92 U.S. 542 (1875).

² McMann v. State Ethics Commission, 32 Mass. App. Ct. 421, 427 (1992) (*citations omitted*).

³ Scaccia v. State Ethics Commission, 431 Mass. 351, 359, *quoting* Selectmen of Avon v. Linder, 352 Mass. 581, 583 (1967). See Edgartown v. State Ethics Commission, 391 Mass. 83, 89 (1984) (The Legislature’s concern about conflict between private interests and public duties may reasonably have motivated it to prohibit involvements that might present *potential* for such conflicts.)

⁴ See 1978 House Doc. No. 5151; St. 1978, c. 210.

⁵ See EC-COI-84-146; EC-COI-85-52.

⁶ See Brockton Educ. Ass’n v. School Committee of Brockton, 47 Mass. App. Ct. 36, 39 (1999) (*citations omitted*).

⁷ Foss v. Commonwealth, 437 Mass. 584, 586 (2002) (*citations omitted*).

⁸ *Webster’s Third New International Dictionary* (1993).

⁹ See, e.g., Hollum, Jr. v. Contributory Retirement Appeal Board, 53 Mass. App. Ct. 220, 223 (2001) (*citations omitted*); Boston Towing and Transportation Co. v. Commissioner of Revenue, 52 Mass. App. Ct. 803, 807 (2001) (“any” refers to entire class).

¹⁰ *Webster’s Third New International Dictionary* (1993).

¹¹ Our analysis is limited to the interpretation of the term “legislative agent” within the context of G.L. c. 268A, § 5(e). We offer no opinion on whether you are required, under G.L. c. 3, § 39, to register as a legislative agent. Whether a person is required to register as a legislative agent falls under the jurisdiction of the Secretary of the Commonwealth. For purposes of this opinion, we also do not need to address whether G.L. c. 268A, § 5(e) applies to those individuals whose paid advocacy is incidental to his or her regular and usual business or professional activities.

¹² Building Com’r of Franklin v. Dispatch Communications of New England, Inc., 48 Mass. App. Ct. 709, 717-18 (2000).

¹³ *Webster’s Third New International Dictionary* (1993).

¹⁴ G.L. c. 268B, § 1(h) defines “governmental body” as follows: “any state or county agency, authority, board, bureau, commission, council, department, division, or other entity, including the general court and the courts of the commonwealth.”

¹⁵ See EC-COI-84-146.

¹⁶ In the Commission’s view, such conduct is merely a slightly attenuated method of appearing before your former governmental body.

¹⁷ See Association of the Bar of the City of New York Special Committee on the Federal Conflict of Interest Laws, Conflict of Interest and Federal Service, 1960, pp. 6-7, discussing the five policy objectives to be addressed in any conflict of interest legislation: government efficiency; equal treatment of equal claims; public confidence; preventing the use of public office for private gain; and preserving the integrity of government policy-making institutions.

¹⁸

Section 5(a) prohibits you from receiving compensation from or acting as agent or attorney for anyone, other than the Commonwealth, in connection with a particular matter in which the Commonwealth is a party or has a direct and substantial interest and in which you previously participated as a state employee. For example, if as a former state employee you participated in drafting or discussing special legislation, you are thereafter permanently restricted from being compensated or acting as agent or attorney for anyone other than the Commonwealth in connection with that legislation.

¹⁹

Section 5(b) prohibits you, as a former state employee, within one year of leaving state service, from appearing personally before any court or agency of the Commonwealth as agent or attorney for anyone other than the Commonwealth in connection with any particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest and which was under your official responsibility as a state employee at any time within a period of two years prior to termination of your employment. Thus, if a piece of special legislation fell within your official responsibility any time during the last two years of your service but you did not participate in discussing or otherwise participating in that legislation, you are nevertheless prohibited from *appearing personally* before any court or agency of the Commonwealth as agent or attorney for anyone other than the Commonwealth in connection with that particular matter for a one year period.

²⁰

Section 23(c) prohibits a current or former public employee from accepting other employment or engaging in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority, and from improperly disclosing such confidential materials or using such information to further his private interests. See *EC-COI-83-154*; *EC-COI-84-9*.